JD(ATL)–18–04
Cincinnati, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

UNITED STATES POSTAL SERVICE

and **CASE 9–CA–40244**

GARY R. SMITH, an Individual

Naima Clarke, Esq.,
for the General Counsel.
Mr. Gary R. Smith,
of Newport, Kentucky,
for the Charging Party.
Arthur S. Kramer, Esq.,
of Philadelphia, Pennsylvania,
for the Respondent.

DECISION

Statement of the Case

KELTNER W. LOCKE, ADMINISTRATIVE LAW JUDGE: The General Counsel of the National Labor Relations Board (the "General Counsel" or the "government") alleges that the United States Postal Service ("Respondent") has violated Section 8(a)(1) and (3) of the Act by discharging Gary Smith from his position as a casual employee and by refusing to hire him for a position as a regular employee. The government further alleges that one of Respondent's supervisors made statements which violated Section 8(a)(1) of the Act. Based upon my conclusions concerning the credibility of the witnesses, I find that Respondent did not violate the Act, and recommend that the Complaint be dismissed.

Procedural History

This case began May 20, 2003 when the Charging Party, Gary R. Smith, filed the initial charge in this matter. Smith amended the charge on July 16, 2003.

After an investigation, the Acting Regional Director for Region 9 of the Board issued a Complaint and Notice of Hearing (the "Complaint") on August 28, 2003. Respondent filed a timely Answer on September 12, 2003.

Hearing opened before me on October 27, 2003. The parties presented evidence on October 27, 28 and 31, 2003. Also on October 31, 2003, counsel gave oral argument.

Uncontested Allegations

Based on admissions in Respondent's Answer, I find that the General Counsel has established that the charge and amended charge were filed on the dates alleged in the Complaint and thereafter served on the Respondent.

Further, I find that Respondent provides postal services within the United States and that the Board has jurisdiction over Respondent by virtue of Section 1209 of the Postal Reorganization Act.

Additionally, based on admissions in Respondent's Answer, I find that at all material times, Local 374, National Association of Letter Carriers, AFL–CIO (the "Union"), has been a labor organization within meaning of Section 2(5) of Act.

Respondent has admitted, and I find, that at all material times, the following individuals have been Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Walter Mace, postmaster of the Middletown, Ohio Post Office; Elaine Huhn, officer–in–charge of the Newport, Kentucky Post Office; David Lofland, Post Office Operations Manager.

Based on the admission in Respondent's Answer, I find that about May 1, 2003, Respondent discharged Charging Party Smith at its Newport, Kentucky facility.

Background

In 1985, the Respondent hired Gary Smith to be a casual employee delivering mail. After 60 days, Smith became a "part–time flexible" employee and began receiving fringe benefits. Smith served in this capacity for one to one and one–half years and then became a "regular" employee. All three positions involved delivery of mail.

In 1991, Smith resigned. However, about three years later, Respondent rehired Smith and assigned him to work as a mail handler/sack sorter. He resigned in 1996.

In October 2002, Respondent again hired Smith and assigned him to work as a casual employee at the Newport, Kentucky post office. This casual position lacked permanence. Under Respondent's collective–bargaining agreement with the Union, during any calendar year, and except for the Christmas holiday season, a casual employee may not work more than two 90–day periods.

During the first four months of 2003, Smith worked steadily for Respondent and his second 90–day period of casual employment was scheduled to end June 29. After that date,

Smith would not be eligible to perform any additional work as a casual until the Christmas holiday.

Some time before May 1, 2003, Smith began seeking a position as a regular employee, so he could continue working for Respondent. He thought he had found such a job opening. However, on May 1, 2003, Respondent refused to hire him for the permanent position and also terminated Smith's employment as a casual. The Complaint alleges that both of these actions violated Section 8(a)(3) and (1) of the Act.

Smith has asserted that Respondent took these actions for two improper reasons: (1) Because he is Jewish, and (2) because Smith's brother is an official in the Union representing Respondent's letter carriers. The first type of alleged discrimination does not fall within the Board's statutory authority and is not before me. The Complaint in this case alleges that Respondent took these actions "because Smith was the brother of the union vice–president and/or because Smith formed, joined or assisted the Union and to discourage employees from engaging in these activities."

Before examining these allegations, it may prevent confusion to note one quirk of Postal Service parlance. Because Smith had worked as a regular employee at one time, Respondent describes its May 2003 refusal to hire Smith for such a position as a refusal to *reinstate* him. However, in labor law the term "reinstate" has a somewhat different connotation. The Complaint in this case alleges a refusal to hire, and for clarity I will follow that usage.

The Alleged Unfair Labor Practices

Complaint Paragraph 5

Complaint paragraph 5 alleges that about April 23, 2003, Respondent, by Walter Mace, told an employee during a job interview that Respondent disliked employee's brother because of the brother's activities on behalf of the Union. Complaint paragraph 7 alleges that this statement violated Section 8(a)(1) of the Act.

Sometime in Spring 2003, Michael Smith had a conversation with his neighbor, Walter Mace, who was postmaster of the Middletown, Ohio, post office. Smith inquired about the possibility that his brother Gary could become a full–time postal employee. This contact led to a job interview.

Gary Smith testified that on April 23, 2003, he attended the job interview with Postmaster Mace. According to Smith, at the start of the meeting, Mace told him, "You know I'm catching hell from Cincinnati for this interview." Smith understood the word "Cincinnati" to refer to higher management, whose offices were located in that city.

Smith also quoted Mace as saying "You know, people downtown Cincinnati don't like your brother for what he represents, the Union."

During his testimony, Mace did not specifically deny making these statements which Smith attributed to him but neither counsel for the General Counsel nor Respondent's counsel specifically asked. Even though Smith's testimony on this point is uncontradicted, I do not credit it.

Based on my observations of the witnesses, I conclude that Mace's testimony is reliable. His testimony does not establish that he had any contact with management in Cincinnati before this interview. The day after the interview, Mace sent a memo to Human Resources Specialist Jennifer Baugh, who reviews the file of every job applicant hired in Respondent's Cincinnati district. In this memo, Mace indicated that he wished to hire Smith.

Because the record does not establish that Mace had discussions about Smith with Cincinnati postal officials before the job interview, it seems somewhat unlikely that he would tell Gary Smith that he was "catching hell" from Cincinnati because of the interview.

Moreover, if Mace really had "caught hell" from Cincinnati postal officials merely for interviewing Smith, it seems likely that he would have written his April 24 memo to them in a different tone. Thus, if Mace had any reason to believe that higher management would be against Mace even interviewing Smith, let alone hiring him, Mace's memo likely would have explained why he had decided to do the interview.

More than that, if Mace had believed that Cincinnati officials opposed hiring Smith, and if Mace wanted to hire Smith anyway, his memo probably would have included more "salesmanship" advocating such action. To overcome the expected resistance, Mace likely would have included a reason why Smith should be hired.

Mace did have a good reason for interviewing Smith and recommending his hire. Mace testified that he was "really short on carriers and I needed to hire somebody. I needed a carrier badly. . ."

Presumably, if Mace had been "catching hell" for the interview and felt a need to defend his decision to interview Smith, he would have mentioned this pressing need for more letter carriers. Similarly, if Mace believed higher management would have to be persuaded to hire Smith, his memo would have referred to the lack of adequate staff. It did not.

For these reasons, I find that Mace did not tell Smith that he was "catching hell" from Cincinnati for interviewing Smith. For the same reasons, I also find that Mace did not tell Smith that people in "downtown Cincinnati don't like your brother for what he represents, the Union." Therefore, I recommend that the Board dismiss the allegations raised by Complaint paragraph 5.

Complaint Paragraph 6

Complaint paragraph 6 concerns two events which allegedly took place on May 1, 2003: Respondent's discharge of Gary Smith from his casual position and Respondent's refusal to hire Smith for the full–time position he was seeking. For clarity, I will depart slightly from the order in which these allegations appear in the Complaint.

Complaint paragraph 6(b) alleges that about May 1, 2003, Respondent discharged Smith at its Newport, Kentucky facility. Respondent has admitted this allegation and I so find.

Complaint paragraph 6(a) alleges that about May 1, 2003, Respondent refused to hire Smith at its Middletown, Ohio facility. Respondent's Answer denied this allegation but added the following:

> By way of further response, Walt Mace in Middletown, Ohio until Gary Smith was fired for falsification of his job application was willing to hire Gary Smith. Walt Mace's decision to hire would not have been approved with respect to a person just fired for falsification of the application.

Thus, although Respondent has denied that it refused to hire Smith for the full–time position, it avers that it wouldn't have hired him in any event in view of the conduct which resulted in his discharge from the part–time position. Additionally, Respondent entered into the following stipulation:

> The postmaster of the Middletown, Ohio station at the time Respondent refused to reinstate Mr. Smith to a career position was Walt Mace.

This stipulation assumes that Respondent refused to hire ("reinstate") Smith to a full–time ("career") position. Moreover, the record as a whole establishes, consistently and without contradiction, that on May 1, 2003, Respondent did refuse to hire Smith for the full–time position he sought. I so find.

Complaint paragraph 6(c) alleges that Respondent refused to hire Smith because Smith was the brother of the Union vice–president and/or because Smith formed, joined or assisted the Union and to discourage employees from engaging in these activities.

Respondent has denied this allegation. As already noted, Respondent asserts that it decided to discharge Smith from his position as a casual employee for a legitimate business reason, providing false information in connection with his application. The lawfulness of Respondent's action turns on its motivation.

Events After Job Interview

As discussed above, in connection with Complaint paragraph 5, Postmaster Walter Mace interviewed Gary Smith on April 23, 2003. In this interview, Smith sought the full–time position which was opening at the post office which Mace managed.

After the interview, Smith continued his work as a casual employee at another facility, supervised by Officer–in–Charge Elaine Huhn, whom Mace contacted for further information. Huhn told Mace that she had supervised Smith only for a short time. She did not make any negative comments about Smith. Mace tentatively decided to hire Smith and notified Respondent's human resources department of that decision in an April 24, 2003 memo.

Human Resources Specialist Jennifer Baugh received Mace's memo. Smith's name sounded familiar to her. She recalled that he had been denied reinstatement the previous December after he had applied for a position at the Cincinnati Post Office.

After conferring with her Supervisor, Baugh reviewed both Smith's personnel file and his accident and injury record. These records included a "Medical History Questionnaire" which Smith had completed as part of the application process. Smith answered these questions by marking a sheet which could be read and analyzed by computer.

When Baugh examined the computer analysis, she discovered that Smith's answer to Question 5 was inconsistent with his answer to Question 73. Smith's answer to Question 5 indicated that a doctor had given him work restrictions "more than five years ago." However, in response to Question 73, Smith stated that a doctor had *never* recommended work restrictions.

In conjunction with a Postal Service nurse, Baugh scrutinized Smith's records. She concluded that Smith had given false answers to two questions. Based on this conclusion, Baugh decided that Smith should not be hired for the full–time position and, more than that, he should be discharged from his current part–time position. She called the post office at which Smith was working and spoke with Officer–in–Charge Huhn.

Baugh discovered that Huhn was reluctant to discharge Smith. Because the collective–bargaining agreement limited how much a casual employee could work, Smith's part–time job would end anyway on June 29, less than 2 months away. Huhn wanted to let Smith complete this service and, after that, not employ him further.

Huhn's answer did not satisfy Baugh, who wanted Smith to be discharged immediately. Baugh took the matter to her supervisor, who contacted the post office operations manager with authority over Huhn and the facility she managed. Later, Baugh and her supervisor met with that manager, David Lofland.

In Lofland's words, Baugh and her supervisor believed that Elaine Huhn "was not taking this serious enough and that, as her supervisor, I should know about it." Lofland told them that they should send the documentation to Huhn, and that he would speak with her about it.

When Lofland spoke with Huhn, he explained the policy regarding discharge of an employee who had given false answers, and told Huhn that she "couldn't just let that ride out." In other words, she should not let Smith continue to work until the end of his period of service as a casual employee. Lofland further told Huhn that, "the appropriate thing to do would be what we always do, and that is to interview the individual, and if things were as they appeared to be, to go ahead and take the necessary action to remove the individual, just like anybody else."

The Discharge Interview

In the following description of the discharge interview, I rely on Huhn's testimony. Based on my observations of the witnesses, I conclude that Huhn's testimony is more reliable, and credit it.

When Gary Smith arrived at work on May 1, 2003, he received a message to call Postmaster Mace, which he did. Mace told Smith that he would not hire Smith for the full–time position. Management in Cincinnati would not allow it.

Shortly after Smith's call to Mace, he received instructions to report to Officer–in–Charge Huhn. She showed Smith the medical history questionnaire, his answer sheet, and his signature. Smith confirmed that it was his signature.

Huhn then told Smith that according to the information in front of her, Smith had falsified information on the medical questionnaire. Smith did not offer any explanation for his answers, explaining that he could not remember that far back. Huhn discharged him.

The Alleged Falsifications

Respondent asserts that when Smith completed the medical history questionnaire, he gave false answers to questions 72 and 73. Smith gave a "no" answer to Question 72, which asked the following:

> Have you, or has anyone acting on your behalf, ever filed an injured–on–duty claim for a work–related injury?

During his testimony, Smith insisted that he had never filed an injury–on–duty claim with the Postal Service. He also testified that he never collected money or benefits for a work–related injury. However, Smith did admit that he suffered such an injury:

> Q. Have you ever hurt yourself while on duty?
> A. Yes, ma'am. In 1989, as a carrier in Walnut Hills, slipped on some ice and — uh, badly sprung my left foot and ankle. I went to Bethesda Hospital and the doctor had me off for seven to ten days.
>
> * * *
>
> Q. What, if any other, times have you hurt yourself while on duty?
> A. 1992 when I was a sack sorter, machine operator. My ring finger got caught in a strap at work. My boss sent me down to the nurse's office, they put some ice on it and I went back to work. And she also stated that they had to notify workman comp because I got hurt on the job.

Based on Smith's testimony, I find that someone, the Postal Service nurse, did file a workers' compensation claim on Smith's behalf. Therefore, I must conclude that Smith's answer to Question 72 was incorrect.

In answering Question 73, Smith marked choice "A" ("Never"). That question asked the following:

> Has a doctor recommended work restrictions for you because of a medical or physical condition or injury (excluding pregnancy)? (check all that apply)
>
> A. Never
> B. Within the past year
> C. Within the past 1–5 years
> D. More than 5 years ago.

As discussed above, Smith's answer – that a doctor had never recommended work restrictions – is inconsistent with his answer to Question 5, indicating that he had been placed on work restrictions "more than five years ago." He gave this explanation for the inconsistency:

> Q. Okay. I'd like to direct your attention again to General Counsel's Exhibit 3, question Number 73. States, "Has a doctor recommended work restrictions for you because of a medical or physical condition or injury, excluding pregnancy?" Do you recall now how you answered that question?
> A. Yes, ma'am, "Never".
> Q. And why at that time did you answer "never"?
> A. I didn't even think about it. I didn't understand the question really, when I read it. I just put "never" down.

The record establishes that Smith gave an incorrect answer to Question 73 as well as to Question 72. In making this finding, I need not determine whether Smith lied or merely made a mistake because the lawfulness of Respondent's conduct does not turn on whether Smith had intended to tell the truth.

Events After the Discharge

Sometime during the first part of May 2003, Michael Smith telephoned Stephen Malizia, the labor relations manager for Respondent's eastern area, which includes the Cincinnati region. According to Smith, he explained what had happened to his brother and then told Malizia "it was either due to the fact of us being Jewish or the position I held in the Union."

Smith quoted Malizia as replying "I really don't think it's because of your nationality, being Jewish. It could be because of your position in the Union." Malizia did not testify and Smith's testimony about the conversation is uncontradicted.

Malizia told Smith he would check into the matter. Three or four days later, Malizia reported to Smith that he had spoken with another individual in labor relations and with Lofland. Smith quoted Malizia as saying "that he told them he hopes they know what they're doing. And that was the end of our conversation."

Later, Smith learned that a regular employee was resigning from a position at the Newport, Kentucky Post Office. Believing that the resignation would create a job vacancy,

which could be filled by his brother, Smith called the officer–in–charge of this post office, Elaine Huhn.

Huhn told Smith that Cincinnati wouldn't let her hire his brother. According to Smith, Huhn didn't give an explanation except "they just won't let me."

Smith then contacted Area Labor Relations Manager Malizia and explained about the opening. According to Smith, Malizia "told me to call Elaine [Huhn] back and have, ask her to reinstate Gary anyway."

Smith called Huhn and asked her to reinstate his brother. However, Smith didn't tell Huhn that he had spoken with Malizia. Instead, he only said that he and "talked to someone." Additionally, Smith did not tell Huhn to reinstate his brother but rather asked, "Why can't you reinstate him?"

Huhn referred to an internal board which made hiring decisions, and said that this board would be meeting the following Tuesday. However, she didn't tell Smith whether or not she would submit his brother's name to this board for consideration.

On May 15, 2003, Michael Smith and Gary Smith met with Gary Kemper, who is officer–in–charge of the Covington, Kentucky post office and Post Office Operations Manager Lofland. As a casual employee, Gary Smith did not have a right to file a grievance under the collective–bargaining agreement and his brother did not accompany him to this meeting as his Union representative. In addition to holding Union office, Michael Smith also was an equal employment opportunity (EEO) counselor and in that capacity represented his brother, who had claimed religious discrimination.

When Michael Smith told Lofland that he wished to discuss his brother, Lofland replied that neither he nor anyone else with the Postal Service was going to hire Gary Smith. The meeting quickly ended. Since then, Respondent has not, at any time, reinstated Smith to his former position as a casual employee or offered him full–time employment.

Analysis of Section 8(a)(3) Allegations

The record clearly establishes that Respondent terminated the Charging Party's employment as a casual employee and refused to hire him for the full–time position he sought. The lawfulness of these actions turns on Respondent's motivation.

Board precedent establishes somewhat different frameworks for evaluating the lawfulness of a refusal to hire and for analyzing the lawfulness of a discharge. Therefore, I will consider these issues separately.

Respondent's Refusal to Hire Smith

In determining whether Respondent acted lawfully in refusing to hire Smith, I will apply the standards which the Board articulated in ***FES (A Division of Thermo Power)***, 331 NLRB No. 20 (May 11, 2000). In that case, the Board stated that to establish a discriminatory refusal to hire, the General Counsel first must show the following at the hearing on the merits:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;
>
> (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and
>
> (3) that antiunion animus contributed to the decision not to hire the applicants.

Once these elements are established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the government meets its burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established.

Clearly, the General Counsel has established the first *FES* element. Middletown Postmaster Walter Mace credibly testified that he "needed a carrier badly" at the time he interviewed Smith for employment. Additionally, Mace interviewed at least two other applicants after Smith's job interview.

The General Counsel also has established the second *FES* element. Respondent was limiting its consideration to applicants who either were casual employees or who previously had held full–time positions with the Postal Service. Smith qualified both ways.

The General Counsel must also prove that antiunion animus contributed to the decision not to hire Smith. However, I conclude that the government has not carried this burden.

Essentially, the phrase "antiunion animus" refers to hostility engendered by an employee's union membership, union activities, or other association with a labor organization. In a typical refusal–to–hire violation, an employer rejects an applicant it otherwise would have employed to prevent that person from bringing his prounion views to the workplace.

This case is somewhat unusual because the government does not contend that Respondent refused to hire Gary Smith because of Smith's own union membership or activities but because of his brother's status as vice president of the Union. Indeed, the record does not establish that Gary Smith engaged in any union activities at all.

The General Counsel argues that management, and particularly Operations Manager Lofland, harbored animus against Union official Michael Smith because he had favorably settled a grievance involving the suspension of a shop steward named Kentrup. Under the government's theory, Lofland discharged this pent–up hostility by discharging Smith's brother. The record, however, falls short of establishing that Lofland either took part in the grievance negotiations or disliked the resulting settlement.

To prove that an anti–union motivation entered into Respondent's refusal to hire Gary Smith, the government relies on statements assertedly made by two managers, Postmaster Walter Mace and Officer–in–Charge Jerry Kellner. The statements attributed to Mace form the basis for Complaint paragraph 5. Allegedly, Mace said that he was "catching hell" from higher management in Cincinnati because he was interviewing Smith. According to Smith, Mace also said "You know, people downtown Cincinnati don't like your brother for what he represents, the union."

For reasons discussed above, I have concluded that Mace did not make these alleged statements. Therefore, they do not provide proof of animus.

Although the Complaint alleges, and Respondent admits, that Mace is a supervisor within the meaning of Section 2(11), it does not allege that Kellner possessed such authority. However, for purposes of discussion, I will assume that to be the case. At the time Gary Smith spoke with Kellner about getting a full–time position, Kellner was officer–in–charge of the Newport, Kentucky Post Office. Later, Elaine Huhn replaced him in this position, and Respondent has admitted Huhn's supervisory status. It is likely that when Kellner held the same position, he possessed similar authority.

In oral argument, the General Counsel referred to a conversation between Kellner and Gary Smith in April 2003. At Smith's request, Kellner had checked with higher management in Cincinnati concerning the prospect of Smith being hired as a full–time employee. Smith described a follow–up conversation in which Kellner reported the results of his inquiry:

> A. Again in April, I approached Mr. Kellner and asked him if he heard anything else. He stated he would resubmit my application for reinstatement. He said — uh, he would resubmit it, he said downtown to Cincinnati. Got an answer back stating that — uh, Cincinnati said he had enough employees, which he had 54 carriers, which — that's what Newport Station was slotted for. He couldn't hire nobody else. But soon as there was an opening, he could hire me. They wouldn't stop him from hiring me. At that time we engaged in some small talk and he said, "People downtown in Cincinnati don't like you or your brother". And I said, "Okay", and that was it. I went on to my job, carrying my work.

Kellner did not testify. Smith's version of the conversation is uncontradicted. For two reasons, however, I conclude that Kellner's statements do not support a finding of animus.

Although Kellner said that "Cincinnati don't like you or your brother," he did not mention the Union. In fact, he did not give any reason for management to dislike either of the Smiths. The government must establish more than animus; it must prove *antiunion* animus.

Second, the statement does not indicate that Respondent's management in Cincinnati would let their personal feelings about the Smiths affect the hiring decision. To the contrary, Kellner said that he could hire Smith and the management in Cincinnati would not stop him.

The General Counsel also contends that the timing of the action indicates antiunion animus. More specifically, the government asserts that when Respondent's Labor Relations Specialist, Jennifer Baugh, approved the hiring of Smith as a casual, she did not know about his relationship to Michael Smith, the Union official. When Baugh later found out about the connection, she disapproved employing (or, in Postal Service terminology, "reinstating") Smith as a full–time worker.

This argument does not take into account that Respondent reasonably would examine the application of someone for full–time employment more carefully than that of an application for casual employment. As Gary Smith himself testified, casual employees have "no rights" under the collective–bargaining agreement. They can be discharged easily if they prove unsatisfactory.

By comparison, making someone a full–time employee potentially created a long-term relationship, and management naturally would examine such an application with additional rigor. On the other hand, the tentative and impermanent nature of a casual employee's work allows management to approach the hiring process more casually.

The General Counsel contends that other management officials also learned about Gary Smith's relationship to Michael Smith before they concurred in the decision not to offer him full–time employment. Based on the record, however, one must wonder whether these management officials in Cincinnati knew anything at all about Gary Smith before making this decision. Post Office Operations Manager David Lofland, for example, had responsibility for between 78 and 103 different postal facilities.

The government also presented evidence concerning a grievance which Union Vice President Michael Smith settled on April 10, 2003, only three weeks before Respondent refused to hire Gary Smith. Arguably, Michael Smith achieved a settlement so favorable to the grievant that it caused management hostility.

However, settling grievances is a routine part of the Union official's work and presumably benefits both sides. Otherwise, both sides would not agree to the settlement. Therefore, absent some other evidence, I will not assume that a grievance settlement automatically causes antiunion animus.

The record does not indicate that Post Office Operations Manager Lofland or other managers in Cincinnati were upset about the settlement. Indeed, a lower–level manager, Officer–in–Charge Huhn, signed the settlement document, and Huhn wanted to hire Gary Smith.

For another reason, I am reluctant to conclude that Michael Smith's settlement of a grievance produced hostility, which affected management's decision, 3 weeks later, not to hire

Gary Smith. This was not the first time that management rejected his application for a full–time job.

Gary Smith previously had applied for reinstatement as a full–time employee, and Respondent had denied this request. A December 13, 2002 letter to Smith from Cincinnati Postmaster John M. Mulkay states as follows:

> This is in response to your request for reinstatement with the U. S. Postal Service.
>
> Your request was forwarded to me for review. As part of all reinstatement requests, the requestors previous employment records are carefully reviewed. After a careful review of your records, I have decided to deny your request.
>
> The Cincinnati District receives numerous requests for reinstatements and reassignments. As general information, any applicant selected must have an excellent work history, good attendance, and a good safety record.

Perhaps Respondent's management in Cincinnati discovered the relationship between the Smith brothers shortly before Respondent refused to hire Gary Smith on May 1, 2003, but Respondent also had refused to hire Smith five and one–half months earlier. Therefore, I conclude that the timing of the May 1, 2003 refusal to hire signifies only coincidence and not causation.

The General Counsel also argues that Respondent treated Smith disparately from the way it had treated other employees and that animus may be inferred from such a disparity. Specifically, the government contends that during the discharge interview, Officer–in–Charge Huhn did not give Smith an opportunity to provide an explanation, but in other instances, the discharged employee did have such an opportunity.

Based upon my observations of the witnesses, to the extent that the versions given by Huhn and Gary Smith disagree, I credit Huhn's. She testified, in part, as follows:

> Q. Did he offer any explanation to explain away the inconsistency?
> A. He said that he couldn't remember, you know, going back that far, you know, when he was filling out the information. And I said, well, you know, I'm sorry, but this is our policy and I have to — I have to do this.
> Q. Did he say anything like those are false reports, I never had those accidents?
> A. No.
> Q. Did you show him the accident forms?
> A. Yes.

This credited testimony indicates that Smith did have an opportunity to explain the inconsistent answers on his medical history form. Moreover, other evidence does not establish that Respondent treated Smith differently from other, similarly–situated employees. To the contrary, the record establishes that Respondent had a consistent practice of discharging employees who gave false answers on their applications. Therefore, I must reject the government's disparate treatment argument.

Michael Smith attributed to one of Respondent's managers a statement, which arguably might constitute evidence of motivation. This person is Stephen Malizia, the labor relations manager for Respondent's eastern area, which includes the Cincinnati region.

Michael Smith testified that he telephoned Malizia and told him what had happened to his brother, adding "it was either due to the fact of us being Jewish or the position I held in the Union." According to Smith, Malizia replied "I really don't think it's because of your nationality, being Jewish. It could be because of your position in the Union." Malizia then told Smith that he would check into the matter.

Malizia did not testify and Smith's testimony is uncontradicted. I will assume that Malizia made the statement Smith attributed to him. However, I conclude that this statement does not evidence animus.

The record suggests that when he received the call from Smith, Malizia did not know anything about the situation. Malizia told Smith he would check into the matter. Logically, he would not have made such a statement if he already knew the facts.

In this context, Malizia's statement that it "could be because of your position in the Union" simply signifies that he was not ruling out such a possibility before he investigated. Therefore, I conclude that it does not constitute evidence of unlawful motivation.

In sum, I conclude that the government has not established the third *FES* element, that antiunion animus contributed to the decision not to hire (or "reinstate") Gary Smith. Therefore, I recommend that the Board dismiss this allegation.

Respondent's Discharge of Smith

To analyze the lawfulness of Smith's discharge, I will follow the framework which the Board established in ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under ***Wright Line***, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. ***Wright Line***, 251 NLRB 1083, at 1089. See also ***Manno Electric, Inc.***, 321 NLRB 278, 280 at fn. 12 (1996).

In the typical case, the government alleges discrimination against an employee because of that person's union or protected concerted activities. In the present case, the General Counsel

contends that Respondent discharged Gary Smith because of the Union activities of his brother, Michael Smith. This theory falls within the scope of Section 8(a)(3) of the Act, which prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. See 29 U.S.C. § 158(a)(3). The discharge of any employee because another employee has engaged in union activities certainly would discourage membership in the labor organization.

The General Counsel has proven the first ***Wright Line*** element. In his capacity as vice president of the Union, Michael Smith represented employees, most notably by assisting those who had filed grievances. Section 7 of the Act protects such activity.

The government also has satisfied the second ***Wright Line*** requirement. In representing employees who had filed grievances, Michael Smith dealt with members of Respondent's management, thus making his Union activities known to them.

The record also establishes that Respondent knew about Michael Smith's fraternal relationship to the Charging Party. Michael Smith made that relationship known to Walter Mace, an admitted supervisor, when he asked Mace about job opportunities for his brother.

The evidence also proves the third ***Wright Line*** element. The discharge of Gary Smith certainly was an adverse employment action.

However, the General Counsel has failed to prove the fourth ***Wright Line*** element. The record does not establish a link between Michael Smith's protected activities and Respondent's decision to discharge Gary Smith.

To prove such a nexus between protected activities and adverse employment action, the government relies on the same evidence needed to prove the third *FES* element, the existence of antiunion animus. Just as the record falls short of establishing such animus, it also fails to prove the fourth ***Wright Line*** element.

If the General Counsel had carried the government's burden of proving all four ***Wright Line*** elements, Respondent would need to present proof that it would have taken the same actions in any event, regardless of protected activity. Because the government has not established the four ***Wright Line*** elements, no presumption arises for Respondent to rebut.

However, even were I to assume that the General Counsel had established all four ***Wright Line*** elements, I would conclude that Respondent has carried its burden of rebutting the government's case. Respondent had a consistent practice of discharging employees who made false statements in documents they completed while applying for work. Following this past practice, it would have discharged Smith even if Smith's brother held no Union office and engaged in no protected activities.

Respondent argues convincingly that it would not have hired for a full–time position someone it had just discharged from a part–time position. Therefore, I recommend that the

Board dismiss both the allegation that Respondent unlawfully refused to hire Smith, and the allegation that it unlawfully discharged him.

Conclusions of Law

1. The Board has jurisdiction over Respondent pursuant to Section 1209 of the Postal Reform Act.

2. At all material times, Local 374, National Association of Letter Carriers, AFL–CIO, has been a labor organization within meaning of Section 2(5) of Act.

3. Respondent did not violate the Act in any manner alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[1]

ORDER

The Complaint is dismissed.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[1] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.